

**NO. PD-0048-19**

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**IN THE**  
**COURT OF CRIMINAL APPEALS OF TEXAS**

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FILED  
COURT OF CRIMINAL APPEALS  
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DEANA WILLIAMSON, CLERK

**THOMAS DIXON,**  
Appellant-Respondent,

v.

**THE STATE OF TEXAS,**  
Appellee-Petitioner.

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**APPELLANT'S SUPPLEMENT TO MOTION FOR REHEARING  
INTERVENING AUTHORITY**

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**TO THE HONORABLE COURT OF CRIMINAL APPEALS:**

Thomas Michael Dixon, the Appellant in the above styled and numbered cause, submits this supplemental authority to his motion for rehearing the decision in the State’s Petition for Discretionary Review (“PDR”) pursuant to Rule 79 of the Texas Rules of Appellate Procedure, and respectfully asks this Court to reconsider its opinion on the merits of that PDR dated January 15, 2020, which reversed the Seventh Court of Appeals judgment and remanded the case to address issues not

previously considered. *Dixon v. State*, PD-0048-19, 2020 WL 223908 (Tex. Crim. App. Jan. 15, 2020).

It has long been established that the standard for Constitutional error is whether the state can prove the error did not affect the verdict beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 23 (1967). This Court, in its opinion on the State's Petition for Discretionary Review, improperly applied a newly engrafted incremental improvement test to defeat the fact that evidence has an effect on the verdict and altering the proper test for showing constitutional error. As a result, at least one Texas Appellate Court has adopted this incorrect standard from the non-final opinion in this case. Incremental improvement is not any part of the test for excusing Constitutional error, in fact, incremental enhancement is an effect on the verdict. The Court's new incremental improvement test is in direct conflict with the Supreme Court's test for constitutional harm and improperly relieves the state of its burden of showing no effect on the verdict beyond a reasonable doubt.

In *Dixon*, this Court applied this incremental improvement test and expressed that the admission of CSLI evidence is harmless when it incrementally improves the jury's reason to believe other evidence presented by the State. *See Dixon*, 2020 WL 220101 at \*2. This is an explanation about how the evidence did affect the verdict. Not any proof that it did not do so. At least one Texas Court of

Appeals has now adopted this Court's incorrect test and implemented the incremental improvement test before the mandate in *Dixon* has issued. The Second Court of Appeals in *Olivas* relied on the *Dixon* opinion holding that because CSLI evidence in the Appellant's case was not a "significant pillar" of the State's case, the error was harmless under the incremental improvement test<sup>1</sup>. See *Olivas v. State*, No. 02-14-00412-CR, 2020 Tex. App. LEXIS 1454, \*15 (Tex. App.—Fort Worth Feb. 20, 2020). *Chapman, supra*, contains neither test for constitutional error and does not contemplate such a diminishment of the no effect on the verdict test or does it allow courts to relieve the state of its burden concerning constitutional error.

The opinion in *Dixon* is not final because there is a pending rehearing on the matter and a mandate has not been issued by this Court. See *Jones v. State*, 711 S.W.634, 636 (Tex. Crim. App. 1986) ("The law is settled that a conviction from which an appeal has been taken is not considered to be a final conviction until the conviction is affirmed by the appellate court and that court's mandate of affirmance becomes final."). Therefore, the Second Court of Appeals application of the "incremental enhancement" test under *Dixon* is improper.

There is currently no final determination in *Dixon*. At least one Court of Appeals has adopting the opinion of this Court and applying the incorrect test for

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<sup>1</sup> The Second Court of Appeals followed the incremental improvement standard in its opinion regarding the admission of CSLI evidence.

constitutional error that is directly in conflict to the law of the Supreme Court of the United States under *Chapman*.

**WHEREFORE, PREMISES CONSIDERED**, the Appellant respectfully requests that a majority of this Court grant his motion for rehearing, and that the case be resubmitted to the Court for *en banc* review and disposition and grant all such relief as is fair and just.

Respectfully submitted,

**GOLDSTEIN & ORR**

By: /s/ Cynthia E. Orr  
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## **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Appellant's Brief has been electronically transmitted to the Post-Conviction Division of the Lubbock County District Attorney's Office as a registered participant of the e-FileTexas, filing system, on this the 20th day of March, 2020 and mailed to Appellant.

By:           /s/ Cynthia E. Orr            
Cynthia E. Orr

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